JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

A

One Visa Sdn Bhd v Telekom Malaysia Bhd

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-1080–09 OF 2012
YEOH WEE SIAM J
22 APRIL 2014

C

Evidence — Documentary evidence — Admissibility of — Maker of letter not called to testify — Whether addressee and recipient of letter can tender it as exhibit

D

Tort — Trespass to land — Encroachment — Telekom Malaysian Bhd ('TMB') telecommunications infrastructure erected on plaintiff's lands since before purchase by plaintiff — Infrastructure constructed before alienation of lands — Infrastructure removed by TMB upon complaint by plaintiff — Whether TMB liable for trespass — Whether TMB liable to pay rent to plaintiff

E

The plaintiff owned five pieces of lands in Negeri Sembilan ('the lands') which the plaintiff purchased at an auction on 22 March 2011. After the purchase, the plaintiff discovered that the lands were occupied by squatters. The plaintiff also discovered that the squatters were supplied with basic amenities, such as electricity, water and telecommunications services. The plaintiff also discovered that the defendant had erected telecommunications infrastructure ('infrastructure') on the lands, and was providing telecommunication services to the squatters. The plaintiff contended that it had never given consent to the defendant to build its infrastructure on the lands. The plaintiff wrote a letter dated 18 May 2012 to the defendant demanding compensation for the lands. The defendant replied vide its letter dated 9 July 2012 denying the plaintiff's claim but nevertheless gave notice to the plaintiff that it would relocate the infrastructure from the lands. The plaintiff disputed the validity of the notices issued by the defendant, as a result of which the defendant had to reschedule the date for entering the lands to remove their infrastructure. The plaintiff claimed that the defendant had trespassed on its lands by placing its infrastructure on the lands without the plaintiff's consent. The plaintiff thus commenced this suit claiming damages for rental value of the lands, loss of opportunity to use the lands, quit rent payable for the lands, land assessment payable for the lands, general damages and aggravated/exemplary damages. The defendant contended that the defendant's infrastructure on the plaintiff's lands dated back to the 1960s because during that time, the poles used by the defendants for its infrastructure were wooden poles, and the defendant's poles on the plaintiff's lands were wooden. There was no rebuttal evidence from the plaintiff to prove that the defendant's infrastructure on the lands were not built

F

G

H

I

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

in the 1960s. In 1981, the lands were alienated by the Negeri Sembilan State Government to Lesco Development Corp Sdn Bhd ('Lesco') and subsequently to Medan Selasih Sdn Bhd ('Medan Selasih'). There was no evidence that Lesco or Medan Selasih objected to the defendant's infrastructure on the lands. The defendant contended that the state government, throughout the years before alienation of the lands, had never objected to the defendant's infrastructure on the lands. The defendant relied on a letter dated 24 January 2014 ('the letter') issued by Pejabat Pengarah Tanah dan Galian Negeri Sembilan to prove that the entry and emplacement of the infrastructure on the lands was approved by the state government.

Held, dismissing the plaintiff's claim (except the claim for rental) and costs to be paid by the defendant:

(1) The letter could be accepted as evidence. Even though the maker was not called as a witness, it sufficed for DW1, being the addressee and recipient of the letter, to tender it in court as an exhibit (see para 34).

(2) Even though the letter did not specifically refer to the plaintiff's lands, the letter was of general application and was wide enough to cover the defendant in this case, more so when it was addressed to the general manager of the defendant/DW1. Going by the contents of this letter, the state government had never objected to the defendant's infrastructure being on the lands before the alienation of the lands to Lesco (see paras 36–38).

(3) In view of the fact that the state government, and the previous proprietors of the lands, had from historical days since the 1960s not taken any action for trespass against the defendant by way of acquiescence, it was unconscionable for the plaintiff to now file this action for such a huge claim of RM221,472,06 (see para 44).

(4) The defendant did not know that the plaintiff had purchased the lands until it was served with the plaintiff's letter of demand. Upon service of that letter of demand, it was only reasonable that the plaintiff gave the defendant sufficient time to remove its infrastructure from the plaintiff's lands if the defendant was not prepared to pay the compensation of RM1,282,008 as demanded in the letter. Further, the defendant had acted within reasonable time in response to the plaintiff's letter of demand dated 18 May 2012 in removing its infrastructure (see paras 45–47).

(5) Based on the historical basis and legal justification of the defendant's position, the defendants should not be made liable to the plaintiff for trespass, and for damages for trespass. Furthermore, the plaintiff had purchased the lands on the basis of 'as is where is'. The plaintiff ought to

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

have known, or was otherwise deemed to have known of the defendant's infrastructure existing on the lands prior to the plaintiff's purchase of the same (see paras 52, 54 & 58).

(6) Telecommunications service is not a basic necessity for daily living, unlike the supply of water and electricity. There was therefore no basis for the plaintiff to claim that it was because of the defendant's provision of telecommunications service to the squatters that encouraged and cause the squatters to continue staying on the lands. Thus, the plaintiff's claim against the defendant for trespass and for damages pursuant to it in regard to the presence of the squatters on the lands was without basis and could not be sustained (see para 59).

(7) While the defendant was not liable for trespass and damages for trespass, in the interest of justice, the defendant ought to pay the plaintiff a monthly rental of that portion of the lands occupied by the defendant's infrastructure from the time the plaintiff was registered as the proprietor of the lands on 18 November 2011 until the time when the defendant removed its infrastructure from the lands in September 2012. It was wholly misconceived for the plaintiff to claim rental for the entire lands when in fact the defendant's infrastructure only occupied 876.075 square metres of the total land area (see paras 61 & 64).

(8) The plaintiff's claim for quit rent for the year 2012 was baseless and could not be allowed. It was the plaintiff's obligation under the law, as a proprietor, to pay the quit rent that was imposed on it. There was no tenancy agreement or any other agreement where the defendant had agreed to pay quit rent and assessment for the lands. There was no legal basis for the plaintiff to claim quit rent from the defendant. Furthermore, the plaintiff's lands were not subject to assessment. The plaintiff's claim for assessment was therefore vexatious, scandalous and mischievous (see paras 66 & 68–69).

(9) There was no evidence that the plaintiff had suffered loss of opportunity for use of the lands due to the defendant's infrastructure on the lands, whether in the form of loss of potential tenants, or whether through development of the lands. Hence, the plaintiff's claim for loss of opportunity and/or loss of profit by reason of the defendant's occupation of the lands by its infrastructure was dismissed (see paras 71 & 73).

[Bahasa Malaysia summary

Plaintif memiliki lima bidang tanah di Negeri Sembilan ('tanah-tanah tersebut') yang dibeli semasa lelongan pada 22 Mac 2011. Selepas pembelian tersebut, plaintif mendapati bahawa tanah-tanah tersebut diduduki oleh setinggan. Plaintif juga mendapati bahawa setinggan tersebut dibekalkan dengan kemudahan-kemudahan asas seperti elektrik, air dan perkhidmatan-perkhidmatan telekomunikasi. Plaintif turut mendapati

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

bahawa defendan telah mendirikan infrastruktur telekomunikasi ('infrastruktur') di atas tanah-tanah tersebut dan memperuntukkan perkhidmatan telekomunikasi kepada setinggan. Plaintif menghujahkan bahawa ia tidak pernah memberi kebenaran kepada defendan untuk membina infrastruktur di atas tanah-tanah tersebut. Plaintif menulis surat bertarikh 18 Mei 2012 kepada defendan memohon pampasan bagi tanah-tanah tersebut. Defendan membalas dalam suratnya yang bertarikh 9 Julai 2012 menafikan tuntutan plaintif tetapi tetap memberi notis kepada plaintif bahawa ia akan menempatkan semula infrastruktur dari tanah-tanah tersebut. Plaintif mempertikaikan kesahan notis-notis yang dikeluarkan oleh defendan, mengakibatkan defendan perlu menyusun semula jadual bagi memasuki tanah-tanah tersebut untuk mengeluarkan infrastruktur-infrastruktur tersebut. Plaintif menghujahkan bahawa defendan telah mencerobohi tanah-tanahnya dengan meletakkan infrastruktur di atas tanah tanpa kebenaran plaintif. Plaintif, dengan itu, memulakan guaman ini menuntut ganti rugi bagi nilai sewaan tanah-tanah tersebut, kehilangan peluang untuk menggunakan tanah-tanah tersebut, cukai pintu yang perlu dibayar bagi tanah-tanah tersebut, taksiran tanah-tanah yang perlu dibayar, ganti rugi am dan teruk/teladan. Defendan menghujahkan bahawa infrastruktur defendan di atas tanah-tanah defendan sejak tahun 1960an lagi kerana tiang-tiang yang digunakan oleh defendan bagi infrastrukturnya ada tiang-tiang kayu dan tiang-tiang defendan di atas tanah-tanah plaintif adalah kayu. Tiada keterangan menyangkal oleh plaintif untuk membuktikan bahawa infrastruktur defendan di atas tanah-tanah tersebut tidak dibina pada tahun 1960an. Pada tahun 1981, tanah-tanah tersebut telah diberi milik oleh Kerajaan Negeri Negeri Sembilan kepada Lesco Development Corp Sdn Bhd ('Lesco') dan seterusnya kepada Medan Selasih Sdn Bhd ('Medan Selasih'). Tiada keterangan bahawa Lesco atau Medan Selasih membantah infrastruktur defendan di atas tanah-tanah tersebut. Defendan menghujahkan bahawa kerajaan negeri, sepanjang tahun-tahun sebelum pemberian milik tanah-tanah tersebut, tidak membantah infrastruktur defendan di atas tanah-tanah. Defendan bersandarkan pada surat bertarikh 24 Januari 2014 ('surat tersebut') yang dikeluarkan oleh Pejabat Pengarah Tanah dan Galian Negeri Sembilan untuk membuktikan bahawa kemasukan dan peletakkan insfrastruktur di atas tanah diluluskan oleh kerajaan negeri.

Diputuskan, menolak tuntutan plaintif (kecuali tuntutan bagi sewaan) dan kos ditanggung oleh defendan:

(1) Surat tersebut tidak boleh diterima sebagai keterangan. Walaupun pembuatnya tidak dipanggil sebagai saksi, adalah mencukupi bagi DW1 sebagai penerima alamat dan surat, untuk mengemukakannya dalam mahkamah sebagai ekshibit (lihat perenggan 34).

(2) Walaupun surat tersebut tidak merujuk kepada tanah-tanah plaintif secara khusus, surat tersebut mempunyai pemakaian am dan cukup luas

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

untuk merangkumi defendan dalam kes ini, lebih-lebih lagi kerana ia dialamatkan kepada pengurus besar defendan/DW1. Melihat pada kandungan surat tersebut, kerajaan negeri tidak pernah membantah infrastruktur defendan yang berada di atas tanah-tanah tersebut sebelum milikan tanah-tanah tersebut diberi kepada Lesco (lihat perenggan 36–38).

(3) Berdasarkan fakta bahawa kerajaan negeri dan pemilik-pemilik tanah-tanah terdahulu telah pada zaman sejarah, sejak tahun 1960an tidak mengambil apa-apa tindakan bagi pencerobohan terhadap defendan melalui persetujuan, adalah tidak wajar untuk plaintif kini memfailkan tindakan ini bagi tuntutan yang amat besar berjumlah RM221,472,06 (lihat perenggan 44).

(4) Defendan tidak mengetahui bahawa plaintif telah membeli tanah-tanah tersebut hinggalah ia diserahkan dengan surat tuntutan plaintif. Dengan penyerahan surat tuntutan tersebut, adalah munasabah bahawa plaintif memberikan defendan masa yang secukupnya untuk mengeluarkan infrastruktur dari tanah-tanah plaintif sekiranya defendan belum bersedia untuk membayar pampasan RM1,282,008 seperti yang dituntut oleh surat tersebut. Selanjutnya, defendan telah bertindak dalam masa yang munasabah untuk membalas surat tuntutan plaintif bertarikh 18 Mei 2012 bagi mengeluarkan infrastrukturnya (lihat perenggan 45–47).

(5) Berdasarkan asas sejarah dan justifikasi perundangan terhadap kedudukan defendan, defendan tidak sepatutnya bertanggungan terhadap plaintif bagi pencerobohan dan ganti rugi pencerobohan. Tambahan lagi, plaintif telah membeli tanah-tanah tersebut atas dasar 'as is where is'. Plaintif sepatutnya tahu, atau dikatakan mempunyai pengetahuan mengenai kewujudan infrastruktur defendan atas tanah-tanah sebelum plaintif membelinya (lihat perenggan 52, 54 & 58).

(6) Perkhidmatan telekomunikasi bukanlah keperluan asas dalam kehidupan harian, tidak seperti bekalan air dan elektrik. Oleh itu, tiada asas untuk plaintif menuntut bahawa peruntukan perkhidmatan telekomunikasi oleh defendan kepada setinggan yang telah menggalakkan dan menyebabkan mereka terus menduduki tanah-tanah tersebut. Oleh itu, tuntutan plaintif terhadap defendan bagi pencerobohan dan ganti rugi berikutan dengannya berkenaan kewujudan setinggan di atas tanah-tanah adalah tidak berasas dan tidak boleh dikekalkan (lihat perenggan 59).

(7) Walaupun defendan tidak bertanggungan bagi pencerobohan dan ganti rugi pencerobohan, demi kepentingan keadilan, defendan sepatutnya membayar sewa bulanan kepada plaintif bagi bahagian tanah yang dipenuhi dengan infrastruktur defendan dari masa plaintif didaftarkan

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

sebagai pemilik tanah-tanah pada 18 November 2011 sehingga masa defendan mengeluarkan infrastruktur dari tanah-tanah pada September 2012. Adalah satu salah tanggapan sama sekali bagi plaintif untuk menuntut sewaan bagi keseluruhan tanah-tanah tersebut sedangkan infrastruktur defendan hanya memenuhi 876.075 meter persegi keseluruhan kawasan tanah (lihat perenggan 61 & 64).

(8) Tuntutan plaintif ke atas cukai pintu adalah tidak berasas dan tidak boleh dibenarkan. Adalah menjadi kewajipan plaintif di bawah undang-undang, sebagai pemilik, untuk membayar cukai pintu yang dikenakan. Tiada perjanjian sewaan atau sebarang perjanjian di mana defendan telah bersetuju untuk membayar cukai pintu dan taksiran tanah-tanah. Tiada asas perundangan bagi plaintif untuk menuntut cukai pintu daripada defendan. Tambahan lagi, tanah-tanah plaintif tidak tertakluk kepada taksiran. Tuntutan plaintif bagi taksiran adalah dengan itu, menyusahkan, bersifat skandal dan memudaratkan (lihat perenggan 66 & 68–69).

(9) Tiada keterangan bahawa plaintif telah mengalami kehilangan peluang untuk menggunakan tanah-tanah tersebut atas sebab infrastruktur defendan di atas tanah-tanah tersebut, sama ada dalam bentuk kehilangan penyewa berpotensi atau sama ada menerusi pembangunan tanah-tanah tersebut. Oleh itu, tuntutan plaintif bagi kehilangan peluang dan/atau menerusi pembangunan tanah-tanah tersebut akibat pendudukan defendan di atas tanah-tanah tersebut melalui infrastrukturnya ditolak (lihat perenggan 71 & 73).]

Notes

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed,2013 Reissue) paras 1350–1371.

For cases on encroachment, see 12(2) *Mallal's Digest* (4th Ed,2013 Reissue) paras 2127–2134.

Cases referred to

Bukit Lenang Development Sdn Bhd v Telekom Malaysia Bhd & Ors [2012] 1 CLJ 228, HC (refd)

Oakfield Enterprises Sdn Bhd v Tenaga Nasional Bhd [2010] 8 CLJ 42, CA (folld)

Legislation referred to

Communications and Multimedia Act 1998 ss 214, 215, 221(1)
Telecommunication Services (Successor Company) Act 1985
Telecommunications Act 1950 (repealed by the Communications and Multimedia Act 1998)

Vanessa Wong (Peter Ling & Van Geyzel) for the plaintiff.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

P Jeyakumar (Nurhidayah, Lourdes Abishegam and Thevini Nayagam with him) (Zahir Jeya & Zainal) for the defendant.

Yeoh Wee Siam J:

THE PLAINTIFF'S CLAIM

[1] In brief, the plaintiff's claim against the defendant is for trespass on the plaintiff's lands, and damages arising from the trespass.

[2] By this writ action the plaintiff seeks judgment against the defendant for a total sum of RM221,472,061. In the statement of claim, the plaintiff applied for the following reliefs:

(a) a declaration that the defendant is a trespasser on the lands and is a nuisance to the plaintiff;

(b) special damages amounting to RM23,077,116 being the total rental value of the lands based on its current prevailing market value rates calculated with effect from 22 March 2011 and continuing until cessation of the telecommunication services and the date of removal of the defendant's offending infrastructure from the lands as per Annexure A and/or alternatively for the same to be assessed;

(c) special damages amounting to RM198,110,908 being loss of opportunity and/or loss of profit by reason of the continued wrongful occupation of the squatters which was caused, encouraged and or facilitated by the defendant resulting in the plaintiff being prevented from developing the lands to its full potential as per Annexure B and/or alternatively, for the same to be assessed;

(d) quit rent for the five pieces of land for the year 2012 amounting to RM234,677 and continuing until full and final settlement thereof and/or alternatively, for the same to be assessed;

(e) land assessment ('assessment') for the five pieces of land for the year 2012 amounting to RM49,360 and continuing until full and final settlement thereof and/or alternatively, for the same to be assessed;

(f) general damages;

(g) aggravated/exemplary damages;

(h) interest at 5%pa on any judgment sum from 22 March 2011 until the date of full and final settlement;

(i) costs; and

(j) any other relief deemed proper and appropriate by this honourable court.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

A BACKGROUND FACTS

[3] The plaintiff is the beneficial and registered owner of five pieces of adjoining lands held under HS(D) 23474 Lot No 3181, HS(D) 23475 Lot 3182, HSD(D) 23477 Lot 3183, HS(D) 23478 Lot 3184 and HS(D) 23479 Lot 3185, all in Pekan Ulu Temiang, Negeri Sembilan ('the lands') (individual registered titles in CBOD3 Pt B pp 1–21).

[4] The plaintiff purchased the lands at an auction held on 22 March 2011 for the purchase price of RM18,550,000. On 18 November 2011, the plaintiff was registered as the registered owner of the lands (see proclamation of sale in CBOD2 Pt A pp 1–7, Form 16F in CBOD2 Pt B pp 8–9, and official land search results (*sijil carian rasmi*) in CBOD1 Pt A pp 26–40).

[5] After the plaintiff had purchased the lands, the plaintiff discovered that the lands were occupied by squatters. The plaintiff also discovered that the squatters were supplied with basic amenities, such as electricity, water and telecommunications services.

[6] The plaintiff also discovered that the defendant had erected, constructed and emplaced telecommunications infrastructure such as poles, conduit pipes, and other equipment ('infrastructure') on the lands, and was providing telecommunication services to the squatters.

[7] Subsequently, the plaintiff further discovered that vide a judgment handed down on 22 June 1984 relating to the lands, the Federal Court had held that the squatters were at all material times squatters, and they did not acquire any equitable rights or interests to remain on the lands.

[8] The plaintiff contended that it had never at all material times given consent to the defendant to build its infrastructure on the lands.

[9] After the plaintiff became aware of the defendant's alleged unlawful use and trespass on the lands, the plaintiff wrote a letter dated 18 May 2012 to the defendant (CBOD1 Pt A pp 6–7) stating that the defendant had given electricity service to the squatters on the lands, and demanding compensation of RM1,282,008 at RM2 per square metre per month for the lands.

[10] It is puzzling why the plaintiff alleged that the defendant was providing electricity service when the defendant's business is to provide telecommunications service.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[11] The defendant replied vide its letter dated 9 July 2012 to deny the plaintiff's claim. The defendant also gave notice to the plaintiff that it would take the necessary steps to relocate the defendant's equipment from the lands (see the defendant's letter in CBOD1 Pt A p 9, notice of intention to enter and do work on land under s 221(1) ('notice') dated 9 July 2012 of the Communications and Multimedia Act 1998 ('the CMA') in CBOD1 Pt A p 10).

[12] Subsequent to that, the plaintiff raised issues regarding the validity of the two notices issued by the defendant, as a result of which the defendant rescheduled the date for which they intended to enter the lands to remove their infrastructure.

[13] The defendant then informed the plaintiff vide its letter dated 28 February 2012 that it would reschedule the relocation of its equipment to 7 –20 September 2012.

[14] However, without the knowledge of the plaintiff, the defendant's employees entered the lands sometime in September 2012 to remove the defendant's infrastructure.

[15] The plaintiff claims that the defendant had trespassed on its lands by placing its infrastructure on the lands without the permission and/or consent of the plaintiff. It is also the plaintiff's claim that the plaintiff had suffered damages as a result of the defendant's trespass.

THE ISSUES

[16] The issues are whether the defendant had trespassed on the plaintiff's lands and if so whether damages, rental of the lands, special damages for loss of opportunity and/or loss of profit, quit rent and assessment ought to be paid by the defendant to the plaintiff.

EVALUATION AND FINDINGS

Whether the defendant had trespassed on the lands

[17] *Halsbury's Laws of England* (3rd Ed), Vol 38 at p 739 spells out what constitutes trespass to land:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon the land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

fixes anything on it or in it, or it seems, if he erects or suffers to continue on his own land anything which invades the air-space of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land (see also *Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322).

[18] In the present case it is undisputed that the defendant had entered into the plaintiff's lands and had built and emplaced its infrastructure on the lands.

[19] The question is whether the defendant had committed trespass on the plaintiff's lands since the plaintiff had not given any permission or consent to the defendant to enter into its lands to build and maintain its infrastructure.

THE DEFENCE

[20] The defendant's defence is premised on several contentions which can be summed up as follows:

(a) the historical basis and legal justification for the defendant's entry into the lands; and

(b) the plaintiff had purchased the lands on a 'as is where is' basis.

The historical basis and legal justification for the defendant's entry into the lands

[21] The defendant's predecessor, Jabatan Telekom (Malaysia) ('JTM'), a department which was formerly part of the federal government, was licensed under the Telecommunications Act 1950, and had erected the infrastructure on the lands.

[22] Ramasamy Mookan ('DW4'), the technical assistant, working for the defendant, testified that he was with the defendant since 1979 and has been serving the defendant for 35 years. He confirmed that the defendant's infrastructure on the plaintiff's lands date back to the 1960s because during that time, the poles used by the defendants for its infrastructure were wooden poles, and the defendant's poles on the plaintiff's lands are wooden. He stated that the telecommunications infrastructure were then erected by JTM for the provision of telecommunications services to government offices such as Jabatan Pengangkutan in Jalan Negeri Sembilan, as well as two schools ie Sekolah Kebangsaan Ulu Temiang and Sekolah Rendah Jenis kebangsaan Cina Chan Hwa. In addition to this, the JTM was also providing telecommunications services to the residents of the Ulu Temiang area using the same 'cabinet' which was located at Jalan Ulu Temiang.

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[23] DW4 stated that when he joined the defendant's service in 1979, Cabinet 11 was already there. The same cabinet is still in use today for the defendant's provision of telecommunications service to its existing and new customers in the area.

[24] DW4's evidence was corroborated by DW5's evidence. DW5 worked in the defendant's museum and confirmed that based on the defendant's museum records, since the 1940s, the defendant had been using wooden poles. Later the poles were changed to metal poles. Currently, the defendant is using concrete poles.

[25] DW5 testified that there were three wooden poles which were removed when the defendant's infrastructure were removed. This is also recorded in the inventory list (CBOD4 Pt B p 146) which shows that three wooden poles were among them.

[26] Thus, it cannot be held that the defendant was merely relying on hearsay evidence.

[27] There is no rebuttal evidence from the plaintiff's sole witness, Wong Hing Keong ('PW1'), the plaintiff's general manager, to prove that the defendant's infrastructure on the lands were not built in the 1960s. Neither did PW1 adduce any evidence that the defendant built its infrastructure on the lands after the plaintiff had purchased the lands. Thus, the court accepts the defendant's evidence that the defendant's infrastructure were built on the lands since the 1960s, and not after the plaintiff had purchased the lands.

[28] In 1981, the lands were alienated by the Negeri Sembilan State Government ('the state government') to Lesco Development Corp Sdn Bhd ('Lesco'), and subsequently to Medan Selasih Sdn Bhd ('Medan Selasih').

[29] There is no evidence that Lesco objected to the defendant's infrastructure on the lands. PW1 himself confirmed that Medan Selasih, the proprietor of the lands before the plaintiff, did not object to the defendant's infrastructure on the lands. There was no previous claim by Lesco and Medan Selasih against the defendant for trespass on the lands.

[30] The JTM was subsequently privatised and pursuant to the Telecommunication Services (Successor Company) Act 1985, the defendant became the successor company of JTM on 1 January 1987, being vested by the Government of Malaysia with all the rights, designated property and liabilities of JTM.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[31] The defendant contended that the state government, throughout the years before alienation of the lands, had never objected to the defendant's infrastructure on the lands. The defendant relied on a letter dated 24 January 2014 (exh D1) ('the letter') issued by Pejabat Pengarah Tanah dan Galian Negeri Sembilan ('PTG') to prove that the entry and emplacement of the infrastructure on the lands was approved by the state government.

[32] In this letter, the PTG, inter alia, stated in paras 2–3:

> 2. Kerajaan Negeri mengambil maklum bahawa Telekom (TM) sering menghadapi masalah tuntutan pencerobohan yang disebabkan oleh peralatan telekomunikasi yang berada di atas tanah-tanah yang diberimilik oleh Kerajaan Negeri kepada pihak-pihak persendirian. Adalah difahamkan bahawa peralatan telekomunikasi tersebut telahpun berada ditanah-tanah yang berkenaan sebelum proses pemberi milikan berlaku.
>
> 3. Pada amnya, Kerajaan Negeri tiada halangan kepada mana-mana Jabatan Kerajaan Persekutuan termasuklah Jabatan Telekom Malaysia untuk membuat pemasangan peralatan, tiang dan kabel di kawasan-kawasan tanah milik Kerajaan Negeri, sekiranya pada hemat Kerajaan Negeri, pemasangan-pemasangan tersebut adalah bagi tujuan kepentingan awam dan kemudahan rakyat.

[33] The plaintiff submitted that the letter cannot be accepted as proof that the state government had consented to the erection of the defendant's infrastructure on the lands for, amongst others, the following reasons:

(a) the letter is merely a general letter to state a general position taken by the state authority. The letter made no reference at all to the lands, and it did not concern the lands;

(b) Ramlan bin Omar ('DW1'), the general manager of the defendant at its Negeri Sembilan office, during cross-examination, agreed that the letter did not mean that approval had been granted for the erection of the defendant's infrastructure on the lands;

(c) there is no credible evidence from the defendant that the defendant's infrastructure was built in the 1960s; and

(d) the maker of the letter, Dato' Hj Mohd Bahrudin bin Mahfuz ('Dato' Bahrudin'), was not called as a witness to give evidence on whether the letter meant that approval was indeed given to JTM to build the defendant's telecommunications infrastructure on the lands.

[34] The court accepted the letter as evidence. Even though the maker was not called as a witness, it suffices for DW1, being the addressee and recipient of the letter, to tender it in court as an exhibit.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[35] DW1 explained that the defendant did not keep documents or records regarding the defendant's plan for infrastructure built on the lands beyond seven years. In accordance with archive procedure, all documents which were more than seven years old have already been destroyed. Having gone through all the years from the JTM days to privitisation of the telecommunications service, the defendant no longer has documents or records of the 1960s. The court accepts the defendant's explanation as a reasonable explanation. The defendant is therefore allowed to rely on DW1's evidence regarding the contents of the letter.

[36] The letter is self-explanatory. It stated that, generally, the state government had no objections to any Federal Government Department, including JTM, to install equipment, poles and cables on land owned by the state government, if such installation is in the public interest and for the benefit of the public. Even though the letter did not specifically refer to the plaintiff's lands, it is headed 'KES TUNTUTAN PENCEROBOHAN TANAH PERSENDIRIAN TERHADAP TELEKOM MALAYSIA BERHAD ('TM')'.

[37] From the heading and paras 2–3 of the letter, the court finds that the PTG's letter is of general application and is wide enough to cover the defendant in this case, more so when it was addressed to the general manager of the defendant/DW1.

[38] Going by the contents of this letter, the court is satisfied that the state government had never objected to the defendant's infrastructure being on the lands before the alienation of the lands to Lesco.

[39] Therefore, it can be safely concluded that from the 1960s until the plaintiff purchased the lands at the auction held on 22 March 2011 and was subsequently registered as the registered owner of the lands on 18 November 2011, the state government, Lesco and Medan Selasih had never objected to the defendant's infrastructure being built and maintained on the lands. The defendant had never been made liable for trespass on the lands, or required to remove its infrastructure from the lands.

[40] In *Bukit Lenang Development Sdn Bhd v Telekom Malaysia Bhd & Ors* [2012] 1 CLJ 228, the High Court held that the statutory duties and obligation of the second defendant (ie 'Tenaga Nasional Bhd') did not absolve it from the liability of trespass.

[41] However, in *Oakfield Enterprises Sdn Bhd v Tenaga Nasional Bhd* [2010] 8 CLJ 42, the Court of Appeal held that 'The fact that the appellant, on the facts, became the new registered owner of the said land on 5 October 1988 did

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

not change the fact that the respondent had been authorised by the land office on 9 November 1974 to enter the said land to carry out the installation of the high-tension cables.'

[42] The next question in the present case is whether the plaintiff is justified to make a claim for trespass against the defendant when clearly the state government had permitted the defendant to install the infrastructure on the lands. The defendant contended that it did not know that the plaintiff owned the lands until it was served with the plaintiff's letter of demand dated 18 May 2012.

[43] Pursuant to the plaintiff's letter of demand, the defendant and the plaintiff had discussions and negotiations on the matter. Finally, the defendant decided to remove its infrastructure from the plaintiff's lands sometime in September, three days before the plaintiff filed this action.

[44] I am of the opinion that whilst the plaintiff has every right to assert its proprietary rights on the lands, in view of the fact that the state government, and the previous proprietors of the lands, had from historical days since the 1960s not taken any action for trespass against the defendant by way of acquiescence, it is unconscionable for the plaintiff to now file this action for such a huge claim of RM221,472,061. The principle in *Oakfield Enterprises* should apply here.

[45] The evidence shows that the defendant did not know that the plaintiff had purchased the lands until it was served with the plaintiff's letter of demand. It is to be noted that nowhere in the letter did the plaintiff allege that the defendant had trespassed on the lands, other than a demand for compensation.

[46] Upon service of that letter of demand, it is only reasonable that the plaintiff gives the defendant sufficient time to remove its infrastructure from the plaintiff's lands if the defendant is not prepared to pay the compensation of RM1,282,008 as demanded in the letter.

[47] The court finds that the defendant had acted within reasonable time in response to the plaintiff's letter of demand dated 18 May 2012. The defendant sent a letter dated 9 July 2012 (CBOD1 Pt A p 9) to the plaintiff. The defendant further gave the plaintiff its notice of intention to enter and do work on land under s 221(1) of the CMA. It was because the plaintiff had raised the issue on the validity of the two notices issued by the defendant, that the defendant had to reschedule the date for which it had intended to enter on the lands to remove its infrastructure.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[48] The defendant informed the plaintiff by letter dated 28 August 2012 that it would reschedule the relocation of its equipment to 7–20 September 2012.

[49] Throughout the period, the defendant had been keeping the plaintiff informed of its intention to remove the infrastructure. However, the defendant erred when it finally entered the plaintiff's lands to remove the defendant's infrastructure sometime in September 2012. While the court does not condone the defendant's failure to inform the plaintiff of the actual date for its entry on the plaintiff's lands, the court is mindful of the statutory provision of the CMA, in particular ss 214 and 215 , which confer the defendant with powers, as a licensee, to enter on land for installation of network facilities, or to inspect land and do anything that is necessary for that purpose, including making surveys.

[50] In my opinion, a power to install infrastructure includes a power to remove such infrastructure. Thus, the defendant, which was empowered by the Telecommunications Act 1950 to install infrastructure on the lands, is now also empowered under the provisions of the CMA to remove its infrastructure from the lands. This would entail entry into the plaintiff's lands for that purpose.

[51] The defendant did act swiftly to remove its infrastructure from the lands. The plaintiff did not prove that the defendant caused any damage to the lands as a result of such removal of the infrastructure.

[52] Based on the historical basis and legal justification of the defendant's position, the court holds that the defendants should not be made liable to the plaintiff for trespass, and for damages for trespass.

The plaintiff had purchased the lands on a 'as is where is' basis

[53] The plaintiff contended that it was because of the defendant's trespass on the lands and the defendant's provision of its telecommunications service to the squatters on the lands that caused the squatters to continue staying illegally on the lands.

[54] Regarding this issue, the court agrees with the defendant's submission that the plaintiff had purchased the lands on the basis of 'as is where is'. This was shown in the following evidence.

[55] The proclamation of the sale for the public auction, in respect of which the plaintiff had purchased the lands (CBOD2 Pt A p 2), inter alia, stated '*HARGA RIZAB* :- Hartanah tersebut akan dijual 'Dalam Keadaan Sedia Ada".

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[56] Counsel for the plaintiff submitted that the sale of the lands based on 'as is where is' is only between the plaintiff and the chargee. The defendant is not a party to the transaction and since there is no privity of contract between the defendant and the plaintiff in that sale and purchase transaction, the defendant cannot rely on the defence of the 'as is where is'.

[57] The court is of the view that the application of 'as is where is' is regarding the plaintiff's purchase of the lands according to its existing condition. The plaintiff is fully aware that it had purchased the lands on the basis of 'as is where is'.

[58] The plaintiff ought to have known, or is otherwise deemed to have known of the defendant's infrastructure existing on the lands and of any squatters on the lands prior to the plaintiff's purchase of the same. In fact, this was confirmed by PW1 who admitted under cross-examination that the lands were sold subject to the existing condition and rights (if any) on the lands. PW1 confirmed that the plaintiff did not buy the lands with vacant possession.

[59] PW1 further admitted that telecommunications service is not a basic necessity for daily living, unlike the supply of water and electricity. He also admitted that Tenaga Nasional Bhd ('TNB') had supplied electricity to the squatters on the lands. There is therefore no basis for the plaintiff to claim that it is because of the defendant's provision of telecommunications service to the squatters that encouraged and cause the squatters to continue staying on the lands. Without the supply of the basic necessities or amenities such as electricity and water, the squatters would not be able to continue staying on the lands. In a scenario where there is no supply of electricity by TNB, and of water by SYABAS, even if the defendant were to continue providing its telecommunications service to the squatters, it is highly improbable that the squatters would continue to stay on the plaintiff's lands. Thus, the plaintiff's claim against the defendant for trespass and for damages pursuant to it in regard to the presence of the squatters on the lands is without basis and cannot be sustained. As submitted by counsel for the defendant, the plaintiff should initiate an action against the squatters instead of commencing this action against the defendant.

Whether the plaintiff is entitled to monthly compensation or rental for use of the lands

[60] The plaintiff claimed the sum of RM23,077,116 for rental of the lands from the time it acquired the lands until the removal of the defendant's infrastructure. The plaintiff based it on the market value of rental on the lands. However, the plaintiff did not produce a valuation report by an independent valuer to support its claim.

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

[61] The court is of the view that while the defendant is not liable for trespass and damages for trespass, in the interest of justice, the defendant ought to pay the plaintiff a monthly rental of that portion of the lands occupied by the defendant's infrastructure from the time the plaintiff was registered as the proprietor of the lands on 18 November 2011 until the time when the defendant removed its infrastructure from the lands in September 2012 ie for the period of about ten months.

[62] In the absence of a valuation report being produced by the plaintiff, the court accepts the valuation report of the defendant (CBOD3 Pt B pp 46–101) which was given, and produced in court by Manohelmi bt Mior Tajudin ('DW6'), the valuation officer at Jabatan Penilaian dan Perkhidmatan Harta, Seremban, Negeri Sembilan, Kementerian Kewangan Malaysia, as unrebutted evidence.

[63] Based on DW6's inspection of the lands, it is confirmed that the area used by the defendant is only a small fraction of the lands ie 9,430 square feet or 876.075sqft out of the total land area of 597,509 square metres. The defendant had used a mere 0.146% of the total land area. DW6 stated that the prevailing market rental value of the lands based on her assessment is 55 sen per square metre per month or RM6.60 per square metre per year.

[64] It is wholly misconceived for the plaintiff to claim rental for the entire lands when in fact the defendant's infrastructure only occupied 876.075 square metres of the total land area.

[65] The court awards the following rental to be paid by the defendant to the plaintiff:

RM0.55 x 876.075 square metres x 10 months = RM4,818.40

Whether the plaintiff is entitled to quit rent of RM234,677 and assessment of RM49,360 on the lands

[66] The plaintiff's claim for RM234,677 being quit rent for the year 2012 against the defendant is baseless and cannot be allowed. It is the plaintiff's obligation under the law, as a proprietor, to pay the quit rent that is imposed on it.

[67] In any case, as submitted by counsel for the defendant, the plaintiff had entered into a tenancy agreement with two tenants for two different lots (CBOD4 Pt B p 170 and CBOD4 Pt B p 180) ie one tenancy which will expire on 30 September 2015 and the other tenancy which will expire on 30 July 2016. In the tenancy agreement, it is provided in cl L (CBOD4 Pt B

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

pp 173 and 183) that 'The Tenant hereby covenants with the Landlord as follows (1) to pay all Quit rent, land rates and/or other assessments chargeable on the Demised Premises during the terms of this tenancy ...'. This means that for these two lots, the plaintiff's tenants are already paying the quit rent and assessment. It is unreasonable for the plaintiff to include in its claim the quit rent and assessment for these two lots from the defendant.

[68] Furthermore, there is no tenancy agreement or any other agreement entered between the plaintiff and the defendant where the defendant had agreed to pay quit rent and assessment for the lands. There is no legal basis for the plaintiff to claim quit rent from the defendant.

[69] Regarding assessment, it appears to the court that the plaintiff had concocted the amount RM49,360 for assessment. As submitted by counsel for the defendant, the plaintiff's lands are not subject to assessment. This is confirmed through the letter of Majlis Perbandaran Seremban dated 7 September 2011 (CBOD4 Pt B p 168). The plaintiff's claim for assessment is therefore vexatious, scandalous and mischievous.

Whether the plaintiff is entitled to claim for special damages for loss of alleged opportunity and/or loss of profit for RM198,110,908

[70] The plaintiff only entered into the abovementioned tenancy agreement with two tenants for two lots of the lands.

[71] There is no evidence that the plaintiff had suffered loss of opportunity for use of the lands due to the defendant's infrastructure on the lands, whether in the form of loss of potential tenants, or whether through development of the lands. There is no evidence of a development plan for the lands.

[72] PW1 could not produce any development order issued by the authorities for the development of the lands. There is no evidence that the presence of the defendant's infrastructure on the lands prevented the plaintiff from developing the lands to their full potential.

[73] In the absence of cogent evidence to support the claim, the court cannot allow the plaintiff the monumental sum claimed for loss of opportunity and/or loss of profit by reason of the defendant's occupation of the lands by its infrastructure.

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Wed Dec 10 16:21:45 2014

DECISION

[74] Based on the above considerations, on a balance of probabilities, the court finds that the plaintiff has failed to prove its claim fully against the defendant.

[75] The plaintiff's claim is dismissed except for prayer 22(b) of the statement of claim where the court allows special damages for the sum of RM4,818.40 for rental of the lands for ten months from 18 November 2011 until September 2012. Interest is allowed on this sum at 4%pa from 18 November 2011 until the date of full realisation.

[76] The defendant is ordered to pay the plaintiff costs of RM15,000.

Plaintiff's claim dismissed (except claim for rental) and costs to be paid by defendant.

Reported by Kanesh Sundrum